UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AURORA FINANCIAL GROUP, INC., Plaintiff, v. MARY K. TOLLEFSON, et al., Defendants.	CASE NO. C20-0297JLR ORDER GRANTING IN PART AND DENYING IN PART THIRD-PARTY DEFENDANT'S MOTION TO DISMISS AMENDED THIRD-PARTY COMPLAINT

I. INTRODUCTION

Before the court is Third-Party Defendant McCarthy & Holthus, LLP's ("MH") motion to dismiss Defendant Mary K. Tollefson's third-party claims. (MTD (Dkt. # 20).) The court has reviewed MH's motion, the parties' submissions filed in support of and in opposition to MH's motion, the relevant portions of the record, and the applicable law.

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Being fully advised,[1] the court GRANTS in part and DENIES in part MH's motion. The court DISMISSES all of Ms. Tollefson's claims against MH except for a portion of her negligent misrepresentation claim. As described below, the court DISMISSES these claims WITHOUT PREJUDICE and with leave to amend except for those claims which are based on statements MH made during the course of judicial proceedings. These statements are immune from suit, and the court DISMISSES Ms. Tollefson's claims that are based on those statements WITH PREJUDICE and without leave to amend.

II. BACKGROUND

On May 22, 2015, Ms. Tollefson executed and delivered to American Financial Network a promissory note in the amount of $297,924.00. (*See* Am. Ans. (Dkt. # 16) ¶¶ 35-36;[2] *see also* Ans. (Dkt. # 2) Ex. D (Dkt. # 2-4) at 2-3; Not. of Rem. (Dkt. # 1) Ex. A (Dkt. # 1-2).) At the same time, Ms. Tollefson executed a deed of trust to Mortgage Electronic Registration System, Inc. ("MERS"), as nominee for American Financial Networks, Inc., encumbering her home as security for the promissory note. (*See* Am. Ans. ¶¶ 35-36; *see also* Ans. Ex. D at 4-15; Not. of Rem. Ex. B (Dkt. # 1-3).) The deed of trust was recorded on June 11, 2015, with the King County Auditor under Instrument No. 20150611000745. (Ans. Ex. D.) On December 5, 2017, the deed of trust was

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[1] No party requests oral argument (*see* MTD at 1; Resp. (Dkt. # 25) at 1), and the court does not consider oral argument to be helpful to its disposition of the motion, *see* Local Rules W.D. Wash. LCR 7(b).

[2] Section IV of Ms. Tollefson's amended answer contains counterclaims and third-party claims. (*See* Am. Ans. at 7-35.) The court's paragraph citations to Ms. Tollefson's amended answer are to this portion of her amended answer.

assigned to Plaintiff Aurora Financial Group, Inc. ("Aurora"), and the assignment was recorded on December 20, 2017, under Instrument No. 20141220000501. (*See* Am. Ans. ¶ 40; Ans. Ex. C (Dkt. # 2-3).)

On July 9, 2015, an identical deed of trust to the one Ms. Tollefson executed on May 22, 2015, was recorded again—this time under Instrument No. 20150709000211. (Am. Ans. ¶ 39; *see also* Ans. Ex. E (Dkt. # 2-5); Not. of Rem. Ex. BB (Dkt. # 1-4).) Once again, the listed beneficiary on the second deed of trust was MERS, as nominee for the lender American Financial Network, Inc. (*See* Ans. Ex. E; Not. of Rem. Ex. BB.) The two deeds of trust are identical in loan number, loan amount, and property description. (*Compare* Ans. Ex. D *with id*. Ex. E; *compare* Not. of Rem. Ex. B *with id.* Ex BB; *see also* Am. Ans. ¶ 39.)

Ms. Tollefson defaulted on her promissory note in August 2017. (Am. Ans. ¶¶ 4, 40.) Third-Party Defendant Freedom Mortgage Corporation ("Freedom Mortgage") obtained the servicing rights to the promissory note after Ms. Tollefson had defaulted and began seeking payment on the note. (*Id.* ¶ 9.)

In early 2018, Ms. Tollefson and Freedom Mortgage were referred to Washington State's foreclosure mediation program and assigned a foreclosure mediator. (*Id.* ¶ 41.) Under RCW 61.24.163, "the parties have a duty to mediate in good faith" and "failure to mediate in good faith may impair the beneficiary's ability to foreclose on the property or the borrower's ability to modify the loan or take advantage of other alternatives to foreclosure." RCW 61.24.163(7)(b)(iii); *see also* RCW 61.24.163(10). The parties

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"scheduled and convened three [mediation] sessions" on May 2, 2018, July 9, 2018, and August 13, 2018. (Am. Ans. ¶ 41.)

Ms. Tollefson alleges that MH also attempted to collect payment on her promissory note after she was in default and that MH was also referred to the foreclosure mediation program and assigned a foreclosure mediator along with herself and Freedom Mortgage. (*See* Am. Ans. ¶¶ 16, 41.) However, the "Foreclosure Mediation Report/Certification" that Ms. Tollefson attaches to her initial answer identifies Ms. Tollefson as the borrower, Freedom Mortgage as the beneficiary, and MH as Freedom Mortgage's attorney. (*See* Ans. Ex. F (Dkt. # 2-6) at 001, 004.) Thus, the document that Ms. Tollefson relies upon to support her allegations identifies MH not as a party to the mediation, but rather as an attorney for one of the parties. (*See id.*)

Ms. Tollefson alleges that the foreclosure mediator certified that both Freedom Mortgage and MH were "lacking good faith in their foreclosure mediation participation." (Am. Ans. ¶ 42.) However, the Foreclosure Mediation Report/Certification that Ms. Tollefson attaches to her initial answer and cites in her amended answer finds only the "beneficiary" or Freedom Mortgage to be "not in good faith." (*See* Ans. Ex. F at 002 (capitalization omitted).) Specifically, the foreclosure mediator stated that the net present value ("NPV") test or analysis was not completed and the beneficiary or Freedom Mortgage "failed to adhere to [the] agreement made during the second mediation session and complete review." (*Id.*)

Ms. Tollefson alleges that three months following their initial foreclosure mediation, Freedom Mortgage and MH served her with a second notice of default signed

November 5, 2018. (An. Ans. ¶ 43.) In early 2019, Ms. Tollefson was once again referred to foreclosure mediation. (*Id.*) This time the parties convened two mediation sessions on February 28, 2019, and June 12, 2019. (*Id.*) Ms. Tollefson again alleges that the foreclosure mediator "certified that Freedom [Mortgage] and MH failed to meet their duty of good faith." (*Id.* ¶ 44.) However, the Foreclosure Mediation Report/Certification upon which Ms. Tollefson relies finds only the "beneficiary" or Freedom Mortgage to be "not in good faith." (*See* Ans. Ex. F at 005 (capitalization omitted).) Specifically, the foreclosure mediator stated that the "beneficiary failed to provide [a] timely [and] complete set of documents." (*Id.* (capitalization omitted).) The foreclosure mediator also stated in relevant part:

> This is the second mediation for this property. The first mediation ended with a finding of "not in good faith" by the beneficiary. . . . The borrower provided required [documents] in a timely manner. The beneficiary says they never received them but the borrower provided proof they were sent and the mediator received them. Beneficiary did not provide a ful[l] set of required documents in a timely manner and kept requesting more documents that had already been provided from the borrower. . . .

(*Id.* (capitalization omitted).)

On January 31, 2020, Aurora, represented by MH, filed a lawsuit in Washington State court against Ms. Tollefson for reformation of the deed of trust and judicial foreclosure. (*See* Compl. (Dkt. # 1-10).) The complaint alleges that MERS has an interest in Ms. Tollefson's property by way of a "Junior Deed of Trust." (*Id.* ¶ 23.) Ms. Tollefson asserts that, in fact, the deed of trust naming MERS "is just a duplicate copy of the original deed of trust recorded on July 9, 2015," under Instrument No. 20150709000211. (*See* Resp. at 4; *see also* Am. Ans. ¶¶ 46-47.) Ms. Tollefson alleges

that Aurora, Freedom Mortgage, and MH filed the complaint alleging that MERS has an interest in her property that MERS does not have in retaliation "for the two bad faith certification[s] in foreclosure mediation." (Am. Ans. ¶¶ 47-49.)

Ms. Tollefson removed Aurora's complaint to this court on February 24, 2020. (*See* Not. of Rem.) Ms. Tollefson filed her initial answer to Aurora's complaint along with counter-claims and a third-party complaint that same day. (*See* Ans.) On March 31, 2020, Ms. Tollefson filed her amended answer, counter-claims, and third-party complaint. (*See* Am. Ans.) MH moved to dismiss Ms. Tollefson's third-party claims on April 14, 2020. (*See* MTD.) The court now considers MH's motion.

III. ANALYSIS

A. Standard on a Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), dismissal for failure to state a claim is proper only if the pleadings fail to allege sufficient facts to establish a plausible entitlement to relief. *Bell Atl. v. Twombly*, 550 U.S. 544, 555-57 (2007).

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . .

Id. at 555 (internal citations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."). Numerous federal courts have applied the pleading standards set forth in *Iqbal* and

Twombley with equal force to cross-claims, counterclaims, and third-party complaints. *See, e.g.*, *Reishus v. Almaraz*, No. CV-10-0760-PHX-LOA, 2011 WL 42679, at *3 (D. Ariz. Jan. 6, 2011); *Se. Pa Transp. Auth. v. AECOM USA, Inc.*, No. 10-117, 2010 WL 4703533, at *3 (E.D. Pa. Nov. 19, 2010) (citing, among other authorities, *Travelers Indem. Co. v. Dammann & Co., Inc.*, 594 F.3d 238, 256 n.13 (3d Cir. 2010)). A district court must accept as true all the factual allegations contained in a third-party complaint and draw all reasonable inferences in favor of the nonmoving party. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Intri-Plex Tech., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1050 n.2 (9th Cir. 2007). Mere legal conclusions, however, "are not entitled to the assumption of truth." *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011) (internal quotation marks and citations omitted); *see also Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001). ("Conclusory allegations of law . . . are insufficient to defeat a motion to dismiss.").

B. Matters the Court Considers

Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *Lee*, 250 F.3d at 688 (citations omitted). One exception to this rule is that the court may take judicial notice of documents pursuant to Federal Rule of Evidence 201.[3] *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018); *see also* Fed R. Evid. 201. Thus, the "court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for

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[3] "The court . . . may take judicial notice on its own." Fed. R. Civ. P. 201(c)(1).

summary judgment." *See Khoja*, 899 F.3d at 999 (quoting Lee, 250 F.3d at 689 (quotation marks and citation omitted)). In addition, the court may consider material that is properly submitted as a part of the complaint. *Lee*, 250 F.3d at 688. Further, if the documents are not physically attached to the complaint, the court may still consider them if their authenticity is not contested and the plaintiff's complaint necessarily relies on them. *Id.* The court is entitled to consider all the documents cited in the background section of this order based on one or both of these exceptions. *See supra* § II.

C. Ms. Tollefson's Third-Party Claims against MH

In her third-party complaint against MH, Ms. Tollefson raises the following claims: (1) abuse of process (Am. Ans. ¶¶ 52-69); (2) violation of Washington State's Consumer Protection Act ("CPA"), RCW ch. 19.86 (Am. Ans. ¶¶ 70-109); (3) violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* (Am. Ans. ¶¶ 110-21); (4) slander of title (*id.* ¶¶ 129-40); (5) negligent misrepresentation (*id.* ¶¶ 141-52); (6) the tort of outrage (*id.* ¶¶ 153-62); and (7) breach of the implied covenant of good faith and fair dealing (*id.* ¶¶ 163-72). MH moves to dismiss each of these claims. (*See generally* MTD.) The court considers each claim in turn.

1. Abuse of Process

Ms. Tollefson alleges that her claim for abuse of process against MH is based on MH's representation of Aurora with respect to Aurora's complaint in this action. (*See* Am. Ans. ¶ 54 ("Aurora, through its lawyers at [MH,] filed a lawsuit against Ms. Tollefson . . . ."); *id.* ¶ 63.1 ("Aurora and [MH] filed the state court complaint in retaliation for two consecutive foreclosure mediation findings of bad faith in 2018-2019.

Legal action here is used to punish Ms. Tollefson with the total and forced denial of any alternative default mitigation to foreclosure."); *see also* Compl.) Ms. Tollefson avers that several allegations contained in Aurora's complaint misrepresent or omit facts concerning the deeds of trust at issue here. (*See, e.g.*, *id.* ¶ 56 ("Aurora's complaint is silent with regard to the fact that the same deed of trust was recorded again July 9, 2015 . . . ."); *id.* ¶ 58 ("Aurora's complaint plead[s] no facts alleging how the purported mistake [in the deed of trust concerning a reference to the county] altered, or could have altered the party's [sic] agreement."); *id.* ¶ 60 ("The state court complaint misrepresents that Aurora is duly authorized to conduct business in Washington."); *id.* ¶ 61 ("The state court complaint . . . misrepresents that MERS has an interest in Ms. Tollefson's property by way of a 'Junior Deed of Trust.'").) She asserts that MH drafted and filed the state court complaint "in retaliation for two consecutive foreclosure mediations findings of bad faith in 2018-2019" (*id.* ¶ 63.1), and that naming MERS as a co-defendant in the complaint "fraudulently encumbered the property thus eliminating the appearance of a lien-free property" (*id.* ¶ 63.2).

The tort of abuse of process is disfavored in Washington. *See Batten v. Abrams*, 626 P.2d 984, 988-89 (Wash. Ct. App. 1981). To prevail on an abuse of process theory, the plaintiff must establish two elements: (1) the existence of an ulterior purpose to accomplish an object not within the proper scope of the process and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings. *Id.* at 988; *Fite v. Lee*, 521 P.2d 964, 968 (Wash. Ct. App. 1974).

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First, the court rejects the notion that conduct within a foreclosure mediation can form the basis for an abuse of process claim. Indeed, Ms. Tollefson admits that "[t]here does not seem to be a case specifically holding misuse of non-judicial foreclosure is a misuse of process." (Resp. at 10.) "[A]lthough Washington courts have not yet ruled on the issue, other courts have denied claims for malicious prosecution or abuse of process based on a nonjudicial foreclosure proceeding because a nonjudicial foreclosure does not constitute the type of legal action contemplated by such claims." *Schwartz v. World Savings Bank*, No. C11-0631JLR, 2012 WL 993295, at *5 (W.D. Wash. Mar. 23, 2012) (citing cases). The court finds these cases persuasive. Under Washington's Foreclosure Fairness Act ("FFA"), the failure to mediate in good faith is a defense in certain circumstances to a nonjudicial foreclosure proceeding. *See* RCW 61.24.163(14). If a nonjudicial foreclosure proceeding does not represent the type of action contemplated by an abuse of process claim, neither does a mediation procedure that at best may serve as a defense to a nonjudicial foreclosure proceeding. Such a mediation procedure is even further removed from the type of legal action contemplated by an abuse of process claim. Thus, the court concludes that MH's alleged conduct during Ms. Tollefson's foreclosure mediations cannot serve as the factual underpinning for her abuse of process claim.

The foregoing ruling leaves MH's participation in drafting and filing Aurora's state court complaint with its alleged misrepresentations and omissions of fact as the sole undergird of Ms. Tollefson's abuse of process claim. However, "[t]he mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process." *Batten*, 626 P.2d at 988-89 (quoting *Fite*, 521 P.2d at 968). Indeed, "there must be an act

after filing suit using legal process empowered by that suit to accomplish an end not within the purview of the suit." *Id.* at 990. Washington courts follow the majority of courts in concluding that the filing of a lawsuit, even if the allegations are "baseless or vexatious," does not constitute the tort of abuse of process. *Id.* at 991. Accordingly, MH's mere participation in the drafting and filing of Aurora's state court complaint—even if the complaint contains frivolous or inaccurate allegations—is insufficient to maintain an abuse of process claim.

In sum, neither MH's representation of Freedom Mortgage in the foreclosure mediations at issue here, nor MH's representation of Aurora in the drafting and filing of Aurora's complaint is sufficient to allege an abuse of process claim against MH. Accordingly, the court grants MH's motion to dismiss Ms. Tollefson's cabuse of process claim against MH.

2. CPA

To recover under the CPA, a plaintiff must prove an "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 710 P.3d 531, 533 (Wash. 1986). MH argues that the court should dismiss Ms. Tollefson's CPA claim because she has failed to allege any unfair or deceptive act by MH. (MTD at 10.) The Washington Legislature, however, has declared that "[i]t is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the [CPA] . . . , for any person or entity to . . . [v]iolate the duty of good faith under RCW 61.24.163." RCW 61.24.135. Thus, if

the foreclosure mediator found MH in bad faith during Ms. Tollefson's foreclosure mediations—as she alleges (*see* Am. Ans. ¶¶ 42, 44, 77, 86-89)—the first two elements of Ms. Tollefson's CPA claim would be met.

In her response to MH's motion, Ms. Tollefson argues that the foreclosure mediator found MH to be "not in good faith" during the foreclosure mediations. (*See* Resp. at 10-11 ("Both foreclosure mediators included [MH] in their bad faith certifications.") (citing Ans. Ex. F & RCW 61.24.135); *see also* Am. Ans. ¶¶ 42, 44 77, 86-89.) However, the documents Ms. Tollefson cites in her third-party complaint do not support her allegation that the foreclosure mediator certified that MH violated its duty to negotiate in good faith. (*See* Am. Ans. ¶ 42 (citing Ans. Ex. F at 2).) Indeed, the Foreclosure Mediation Report/Certification that Ms. Tollefson attaches to her initial answer and cites in her amended answer finds only the "beneficiary" or Freedom Mortgage to be "not in good faith." (*See* Ans. Ex. F at 002, 005 (capitalization omitted).) Further, pursuant to the Foreclosure Mediation Report/Certification, MH was not a party to the mediation but rather only appeared as Freedom Mortgage's attorney. (*See id.* at 001, 004.) Thus, the court does not find Ms. Tollefson's allegation that MH was found to be "not in good faith" during the foreclosure mediation to be plausible and disregards it.

Ms. Tollefson nevertheless argues that MH is liable for the foreclosure mediator's finding that Freedom Mortgage was "not in good faith" by virtue of MH's status as Freedom Mortgage's attorney and agent. (Resp. at 11.) In analogous circumstances involving an alleged violation of the FDCPA, the Ninth Circuit stated that "there is no legal authority for the proposition that an attorney is generally liable for the actions of his

[or her] client."[4] *See Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1173 (9th Cir. 2006). The court finds this authority persuasive in the context of an alleged CPA violation. Accordingly, the court concludes that MH cannot be held liable for the foreclosure mediator's finding that Freedom Mortgage "was not in good faith" or for a CPA violation based merely on MH's status as Freedom Mortgage's attorney. The court concludes that Ms. Tollefson has failed to allege facts supporting an unfair or deceptive act on the part of MH. Thus, the court grants MH's motion to dismiss Ms. Tollefson's CPA claim.

3. FDCPA

The elements of an FDCPA claim are: (1) the plaintiff has been the object of collection activity arising from a consumer debt; (2) the defendant collecting the "debt" is a "debt collector" as defined in the FDCPA; and (3) the defendant engaged in any act or omission in violation of the provisions of the FDCPA. *See Estate of Hoskins v. Wells Fargo Bank, N.A.*, No. C20-75RSM, 2020 WL 3884517, at *8 (W.D. Wash. July 9, 2020). MH argues that the court should dismiss Ms. Tollefson's FDCPA claim because her allegations fail to show that MH violated any provision of the FDCPA. (MTD at 11-12.) The court agrees for the reasons stated below.

[4] The case that Ms. Tollefson relies upon is distinguishable. (*See* Resp. at 11 n.5.) In *Fite*, the court held that the attorney and not the client could be held liable for abuse of process when the attorney acted outside the authority and without the knowledge of his client. *See Fite*, 521 P.2d at 969 ("It follows then that if an attorney has, without the knowledge or consent of his client, abused process to the damage of another, the attorney acts outside the scope of agency and the client should not be held derivatively liable. . . . Consequently dismissal of the action against the client should not be res judicata of the injured party's claim against the attorneys." (citations omitted)). Thus, the court's narrow holding in *Fite* is inapplicable here.

First, Ms. Tollefson repeatedly describes MH as a "debt collector," "attempting to collect a 'debt,'" "engaged in the business of collecting debts," a "collection agency," or in a similar manner without accompanying factual content. (*See, e.g.*, Am. Ans. ¶¶ 15-19, 20-21, 24-27, 114.) These allegations constitute nothing more than legal conclusions, and they fail to meet the *Iqbal/Twombly* pleading standard. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555-57. Accordingly, the court disregards them.

To the extent that Ms. Tollefson bases her FDCPA claim on MH's alleged involvement in enforcing the deeds of trust on her property or serving a notice of default as a part of that process (*see, e.g.*, Am. Ans. ¶¶ 43, 113), Ninth Circuit authority precludes such a claim. Specifically, in *Vien-Phuong Thi Ho v. Recontrust Co.*, the Ninth Circuit concluded that "actions taken to facilitate a non-judicial foreclosure, such as sending the notice of default and notice of sale, are not attempts to collect 'debt' as that term is defined by the FDCPA." 858 F.3d 568, 572 (9th Cir. 2017).

Nevertheless, the Ninth Circuit has also concluded that "some security enforcers are debt collectors only for the limited purposes of [15 U.S.C. § 1692f(6)]." *Vien-Phuong Thi Ho*, 858 F.3d at 573. A security enforcer violates 15 U.S.C. § 1692f if it takes or threatens to take any nonjudicial action to effect dispossession or disablement of property if "there is no present right to possession of the property claimed as collateral through an enforceable security interest," "there is no present intention to take possession of the property," or " the property is exempt by law from such dispossession or disablement." 15 U.S.C § 1692f(6)(A)-(C).

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Although Ms. Tollefson generally alleges that Freedom Mortgage's and MH's conduct during Ms. Tollefson's foreclosure mediations violated 15 U.S.C. § 1692f(6) (*see* Am. Ans. ¶¶ 115-115.3), she fails to allege facts supporting MH's liability for any of the specific acts referenced in 15 U.S.C. § 1692f(6)(A)-(C) (*see generally* Am. Ans.). As noted above, MH was not a party to the mediation and served only as Freedom Mortgage's attorney. (*See* Ans. Ex. F at 001, 004.) In *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994), the Ninth Circuit concluded that, in the context of an FDCPA violation, "Congress intended the actions of an attorney to be imputed to the client on whose behalf they are taken." *Id.* at 1516. Although the ruling in *Fox* might serve as a basis for finding a deed of trust beneficiary liable based on the alleged actions of its attorney, it is not a basis for finding MH liable based on Freedom Mortgage's alleged behavior. *See id.* On the other hand, in *Clark*, the Ninth Circuit held that the district court appropriately granted summary judgment in favor of an attorney who was retained by a debt collector to send a collection letter and take other legal actions against the debtor. 460 F.3d at 1173. The attorney could not be held vicariously liable for the actions of his client because the debtors did not offer any evidence "upon which a reasonable trier of fact could conclude that [the attorney] exercised control over [the debt collector]." *Id*. Likewise, here, Ms. Tollefson has not alleged any facts to suggest that MH exercised control over Freedom Mortgage. Indeed, she has only alleged that MH served as both Aurora's and Freedom Mortgage's attorney and therefore agent. (*See* Am. Ans. ¶ 54 ("Aurora, through their lawyers at [MH] filed a lawsuit against Ms. Tollefson in King County Superior Court . . . ."); Ans. Ex. F at 001, 004 (identifying MH as

Freedom Mortgage's attorney in the foreclosure mediations)); *see also Comm'r v. Banks*, 543 U.S. 426, 436 (2005) ("The relationship between client and attorney, regardless of the variations in particular compensation agreements or the amount of skill and effort the attorney contributes, is a quintessential principal-agent relationship.") (citing Restatement (Second) of Agency § 1, cmt. e (1957)).

Finally, Ms. Tollefson alleges that MH is liable under the FDCPA for drafting Aurora's state court complaint which names MERS as a defendant and seeks a judicial foreclosure on her property. (*See* Am. Ans. ¶ 115.4; *see also id*. ¶¶ 35-36; Ans. Ex. D at 4-15; Not. of Rem. Ex. B.) Ms. Tollefson argues that the description in Aurora's complaint of the duplicate deed of trust as a "Junior Deed of Trust" benefiting MERS misrepresents an interest in Ms. Tollefson's property and "threatens to exact possession of a larger interest in Ms. Tollefson's property than Aurora can rightfully claim." (*See* Am. Ans. ¶ 115.4; *see also* Compl. ¶ 23.)

The Ninth Circuit recently considered whether a person who initiates a judicial foreclosure is attempting to collect a debt within the confines of the FDCPA. The Court stated in pertinent part:

> Our cases make clear that a plaintiff must identify something beyond the mere enforcement of a security interest to establish that the defendants are acting as debt collectors subject to the FDCPA's broad code of conduct. . . . That additional debt-collection ingredient can be present for judicial foreclosure, provided that state law permits a creditor to recover money from the debtor after foreclosure if the property sells for less than the debt. . . . That remedy, called a deficiency judgment, is often available in judicial foreclosure proceedings (but typically not in non-judicial proceedings). . . . But unless a deficiency judgment is on the table in the proceeding, a person judicially enforcing a deed of trust in seeking only the return or sale of the security, not to collect a debt.

Barnes v. Routh Crabtree Olsen PC, 963 F.3d 993, 999 (9th Cir. 2020). In its complaint, Aurora asks for a deficiency judgment. (Compl. ¶ 28.) Thus, Aurora's complaint may constitute an attempt to collect a debt within the scope of the FDCPA.

However, Ms. Tollefson has failed to identify any role by MH in the filing of the complaint other than to act as Aurora's attorney. (*See id.* ¶ 54 ("Aurora, through their [sic] lawyers at [MH] filed a lawsuit against Ms. Tollefson in King County Superior Court . . . ."); *see also id.* ¶ 63.1 ("Aurora and [MH] filed the state court complaint in retaliation for two consecutive foreclosure mediation findings of bad faith in 2018-2019.").) As noted above, Ms. Tollefson makes no allegations that MH exercised control over Aurora. (*See generally id.*) Accordingly, there is no basis alleged in Ms. Tollefson's FDCPA claim for a finding of liability on the part of MH merely because MH served as Aurora's attorney in the drafting and filing of Aurora's state court complaint. *See Clark*, 460 F.3d at 1173. Accordingly, the court concludes that Ms. Tollefson has failed to properly allege an FDCPA claim against MH and grants MH's motion to dismiss this claim.

4. Negligent Misrepresentation

To state a claim for negligent misrepresentation, Ms. Tollefson must allege the following elements: (1) the defendant supplied information for the guidance of others in their business transaction that was false; (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his or her business transaction; (3) the defendant was negligent in obtaining or communicating the false information; (4) the plaintiff relied on the false information supplied by the defendant; (5) the plaintiff's

reliance on the false information supplied by the defendant was justified (that is, the reliance was reasonable under the surrounding circumstances); and (6) the false information was the proximate cause of the plaintiff's damages. *ESCA Corp. v. KMPG Peat Marwick*, 959 P.2d 651, 654 (Wash. 1988). Ms. Tollefson argues that MH supplied false information during the foreclosure mediation sessions and misrepresented and omitted material facts from the state court complaint that MH drafted for Aurora. (*See* Am. Ans. ¶¶ 141-52.)

MH challenges only the first element of Ms. Tollefson's negligent misrepresentation claim. (*See* MTD at 15.) MH argues that because it was not a party to the mediations but only acted as Freedom Mortgage's counsel, it did not supply any information to Ms. Tollefson. (*See id.* ("Because MH was not a party [to the foreclosure mediation sessions] required to supply information during the mediations, [Ms. Tollefson's] entire claim fails.").) Further, MH argues that Aurora's complaint did not contain any false statements. (*Id.*)

First, the court notes that "[n]othing in Washington case law supports the contention that attorneys are exempt from liability to nonclients for negligent misrepresentation." *Lawyers Title Ins. Co. v. Baik*, 55 P.3d 619, 625 n.10 (Wash. 2002). However, Washington courts have recognized absolute immunity in a judicial proceeding for statements made by a witness, a party, or an attorney during the course of a judicial proceeding. *See Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 776 P.2d 666, 669-70 (Wash. 1989) (applying the immunity to witnesses); *McNeal v. Allen*, 621 P.2d 1285, 1286 (Wash. 1980) (applying the immunity to parties and attorneys). The immunity is

generally applied to bar suits alleging defamation but is not limited to defamation. *See, e.g.*, *Jeckle v. Crotty*, 85 P.3d 931, 937 (Wash. Ct. App. 2004) (applying the immunity to claims for interference with the plaintiff's business relationship with his patients, outrage, infliction of emotional distress, and civil conspiracy). Because statements made by counsel in the course of judicial proceedings are immune from suit, Ms. Tollefson may not base her negligent misrepresentation claim on statements drafted by MH and included in Aurora's complaint. To the extent that Ms. Tollefson's claim is based on these statements, the court grants this portion of MH's motion and dismisses this portion of Ms. Tollefson's negligent misrepresentation claim.

The statements that Ms. Tollefson alleges that MH made during the foreclosure mediation proceedings, however, are not subject to the immunity for statements made in the course of judicial proceedings. Significantly, the mediation sessions are ancillary to Freedom Mortgage's and Aurora's attempt to nonjudicially foreclose on Ms. Tollefson's property. *See Brown v. Wash. State Dep't of Commerce*, 359 P.3d 771, 773-75 (Wash. 2015) (describing the interplay between Washington's Deed of Trust Act ("DTA"), RCW ch. 61.24, and mediation under the FFA). Thus, not only are mediation sessions conducted under the FFA not judicial proceedings, they are not even ancillary to judicial proceedings. Accordingly, it is possible for an attorney to be held liable for negligent misrepresentation for statements he or she made during such mediation sessions even if those statements were made on behalf of a client—so long as all the elements of the tort are otherwise present. The court, therefore, rejects MH's argument that Ms. Tollefson's claim fails because MH was not a party to the mediation and cannot be held liable for

"relaying" the statements of its clients Freedom Mortgage or Aurora. (*See* MTD at 15.) Accordingly, the court denies MH's motion to dismiss Ms. Tollefson's negligent misrepresentation claim for MH's alleged misrepresentations made during Ms. Tollefson's foreclosure mediation sessions.

5. Slander of Title

Ms. Tollefson's claim against MH for slander of title is based on the statements contained in Aurora's complaint that MH drafted. (*See* Am. Ans. ¶¶ 129-40.) Ms. Tollefson alleges that statements in Aurora's complaint alleging that MERS has an interest in her property and that there is a "Junior Deed of Trust" encumbering her property are false and caused her to suffer pecuniary loss. (*See id.*) For the same reason that MH is immune with respect to Ms. Tollefson's claim of negligent misrepresentation arising out of statements contained in Aurora's complaint, MH is also immune from liability for slander of title arising out of those same statements. *See supra* § III.C.4 (discussing the applicability of immunity for statements made in the course of judicial proceedings). Accordingly, the court grants this portion of MH's claim and dismisses Ms. Tollefson's claim for slander of title against MH.

6. Tort of Outrage

To state a claim for outrage, Ms. Tollefson must allege: "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." *See Dicomes v. State*, 782 P.2d 1002, 1012 (Wash. 1989). Although these three elements are questions of fact for the jury, the court must initially "determine if reasonable minds could differ on whether the

conduct was sufficiently extreme to result in liability." *Id*. "The conduct in question must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (internal quotation marks omitted).

MH moves to dismiss this claim arguing that Ms. Tollefson's allegations against it do not amount to the type of outrageous behavior encompassed by the tort. (MTD at 15-17.) Ms. Tollefson relies on her allegations that the foreclosure mediator twice found MH to be in bad faith during the foreclosure mediations and that MH misrepresented the nature of MERS's interest in the duplicate deed of trust recorded against her property when MH drafted and filed Aurora's state court complaint. (*See, e.g.*, Am. Ans. ¶¶ 157, 159; *see also* Resp. at 16-17). She argues that MH's actions resulted in a cloud on the title of her property, reduced her property's value, violated the DTA, and caused her grief, shame, and humiliation. (*See* Resp. at 17; *see also* Am. Ans. ¶ 160.) She argues that these allegations are sufficiently extreme to meet the threshold for outrage. (*See* Resp. at 15-18.)

First, the court notes that it has found Ms. Tollefson's allegation that the foreclosure mediator found MH in bad faith to be not plausible based on the documents Ms. Tollefson relies upon in her complaint. *See supra* § III.C.2. Second, as for the remainder of Ms. Tollefson's allegations against MH, the court agrees with MH that they do not meet the threshold for stating the tort of outrage.

In *Lyons v. U.S. Bank National Association*, the Washington Supreme Court recognized that "[c]onduct during foreclosure could support a claim for intentional

infliction of emotional distress, but it must satisfy the high burden applicable to these claims." 336 P.3d 1142, 1151 (Wash. 2014). Indeed, courts have found outrageous conduct in situations where the defendants allegedly induced the plaintiff to enter a loan modification agreement, accepted payments for more than two years, then revoked the agreement, declared the borrower in default, and attempted to foreclose, *see Estes v. Wells Fargo Home Mortg.*, No. C14-5234 BHS, 2015 WL 362904, at *6 (W.D. Wash. Jan. 27, 2015), and where defendants allegedly engaged in similar conduct and also used a perjured declaration in the foreclosure process, *see Montgomery v. SOMA Fin. Corp.*, No. C13-360 RAJ, 2014 WL 2048183, at *7 (W.D. Wash. May 19, 2014).

Ms. Tollefson, however, alleges nothing as extreme or outrageous against MH in this case. Significantly, Ms. Tollefson admits that she is in default on her promissory note. (*See* Am. Ans. ¶¶ 4, 40.) The plaintiffs' allegations concerning default in *Estes* and *Montgomery* stand in contrast to Ms. Tollefson's straightforward admission. In *Estes*, the plaintiff was making trial payments on the defendants' proposed loan modification at the time that the defendants nevertheless initiated a nonjudicial foreclosure against the plaintiff's property. 2015 WL 362904, at *2-*3. In *Montgomery*, the plaintiffs alleged that the defendants never applied certain monthly mortgage payments to their account balance, represented that the plaintiffs were in default on their note when they were not, and then induced the plaintiffs to default so the defendants could foreclose on the property. 2014 WL 2048183, at *1-*2. These factual distinctions concerning default render the defendants' alleged behavior in *Estes* and *Montgomery* more extreme.

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The essence of Ms. Tollefson's allegations against MH is as follows: Ms. Tollefson alleges that MH served as counsel to a client, Freedom Mortgage, who the foreclosure mediator twice found to be in bad faith as to its conduct during Ms. Tollefson's foreclosure mediations. (*See* Ans. Ex. F); *see also supra* § III.C.2 (finding Ms. Tollefson's allegations that MH was a party to the mediation, as opposed to Freedom Mortgage's counsel, and that the foreclosure mediator found MH in bad faith during the mediations to be implausible). In addition, Ms. Tollefson asserts that MH represented Aurora in drafting and filing Aurora's state court complaint and that the complaint's allegations misrepresent and omit material facts concerning the deeds of trust recorded on her property. (*See* Am. Ans. ¶¶ 46-49.) These allegations are more akin to the majority of cases in which courts have found that although a defendant's alleged actions during the foreclosure process may have violated the DTA, supported a CPA claim, or been "problematic, troubling, or even deplorable," *see Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115, 1128 (W.D. Wash. 2010), they did not "shock the conscience or go beyond all sense of decency" and were insufficient to support the tort of outrage, *Lyons*, 336 P.3d at 1152; *see also Grande v. U.S. Bank Nat'l Ass'n*, No. C19-333 MJP, 2019 WL 3238471, at *6 (W.D. Wash. July 18, 2019) (concluding that the defendant bank's actions in foreclosing on the plaintiffs' property after agreeing to but failing to execute multiple loan modifications was insufficient to constitute the tort of outrage). Accordingly, the court grants this portion of MH's motion and dismisses Ms. Tollefson's outrage claim against MH.

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7. Breach of the Implied Covenant of Good Faith

Ms. Tollefson also alleges a breach of the implied covenant of good faith and fair dealing against MH. (*See* Am. Ans. ¶¶ 163-72.) MH moves to dismiss this claim on grounds that Ms. Tollefson has failed to allege any contractual relationship between MH and herself. (MTD at 17.)

Under Washington law, an implied duty of good faith and fair dealing exists in every contract. *Badgett v. Sec. State Bank*, 807 P.2d 356, 360 (Wash. 1991) ("There is in every contract an implied duty of good faith and fair dealing."). However, the duty arises only in connection with contractual terms agreed to by the parties. *Id.* Indeed, "[t]he implied duty of good faith is derivative, in that it applies to the performance of specific contract obligations." *Johnson v. Yousoofian*, 930 P.2d 921, 925 (Wash. Ct. App. 1996), *as amended* (Jan. 9, 1997). "If there is no contractual duty, there is nothing that must be performed in good faith." *Id.* Thus, as a threshold matter, Ms. Tollefson must plausibly allege privity between herself and MH to bring contract-based claims, including a claim that MH violated the duty of good faith and fair dealing. *See Kautsman v. Carrington Mortg. Servs., LLC*, No. C16-1040-JCC, 2018 WL 513588, at *4 (W.D. Wash. Jan. 23, 2018) (citing *N.W. Indep. Forest Mfrs. v. Dep't of Lab. & Indus.*, 899 P.2d 6, 9 (Wash. Ct. App. 1995)). She has failed to do so, and indeed, based on Ms. Tollefson's allegations, there does not appear to be any such relationship. (*See generally* Am. Ans.) Instead, Ms. Tollefson alleges that MH is counsel to Aurora and Freedom Mortgage. (*See id.* ¶ 54 ("Aurora, through their lawyers at [MH] filed a lawsuit against Ms.

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Tollefson in King County Superior Court . . . ."); Ans. Ex. F at 001, 004 (identifying MH as Freedom Mortgage's attorney in the foreclosure mediations).)

Ms. Tollefson nevertheless argues that the court should not dismiss this claim because Washington courts have found joint and several liability between lenders and their assigns. (Resp. at 18-19 (citing *White v. Homefield Fin., Inc.*, 545 F. Supp. 2d 11159, 1166 (W.D. Wash. 2008)).) However, Ms. Tollefson asserts no allegations that the lender or mortgagee herein assigned any of its interest in Ms. Tollefson's promissory note to MH. (*See generally* Am. Ans.) Accordingly, the court grants this portion of MH's motion and dismisses Ms. Tollefson's claim against MH for breach of the implied covenant of good faith and fair dealing.

D. Leave to Amend

When the court grants a motion to dismiss, it must also decide whether to grant leave to amend. *Mora v. Countrywide Mortg.*, No. 2:11-cv-00899-GMN-RJJ, 2012 WL 254056, at *2 (D. Nev. Jan. 26, 2012). Ordinarily, leave to amend a complaint should be freely given following an order of dismissal. *See* Fed. R. Civ. P. 15(a)(2). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. *See Thinket Ink Info. Res., Inc. v. Sun Microsys., Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004); *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) ("A district court does not err in denying leave to amend where the amendment would be futile." (citing *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990)).

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Here, the court concludes that it would futile for Ms. Tollefson to replead the portion of her negligent misrepresentation claim that is based on allegations MH draft in Aurora's complaint herein or her slander of title claim against MH. This is so because these claims are based statements made in the course of judicial proceedings and are therefore immune from suit. *See supra* §§ III.C.4, III.C.5. Accordingly, the court dismisses these claims with prejudice. However, the court grants Ms. Tollefson leave to amend the remainder of her claims against MH, if appropriate. If Ms. Tollefson elects to amend her complaint in a manner consistent with this order, then she must file her amended complaint within 20 days of the filing date of this order.

IV. CONCLUSION

Based on the foregoing analysis, the court GRANTS in part and DENIES in part MH's motion to dismiss Ms. Tollefson's claims (Dkt. # 20). The court GRANTS MH's motion and dismisses all of Ms. Tollefson's claims against MH except for a portion of her claim for negligent misrepresentation. The court GRANTS Ms. Tollefson leave to amend her complaint except for those tort claims that are based on statements MH drafted in Aurora's state court complaint. The court DISMISSES these claims, which include Ms. Tollefson's claim for slander of title and a portion of her claim for negligent misrepresentation, WITH PREJUDICE and without leave to amend because MH is

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immune from suit based on statements it made in the course of judicial proceedings. *See supra* §§ III.C.4, III.C.5, III.D.

Dated this 19th day of August, 2020.

JAMES L. ROBART
United States District Judge